MALAYSIAN REPORTS

Wai Chan Leong v Public Prosecutor

SUPREME COURT (KUALA LUMPUR) - CRIMINAL APPEAL NO 84 OF 1987
MOHAMED AZMI, AJAIB SINGH AND GUNN CHIT TUAN SCJJ
29 AUGUST 1989

Criminal Procedure - Information to police leading to discovery of drugs - Not given under caution - Accused in custody - Whether admissible - Evidence Act 1950, s 27 - Dangerous Drugs Act 1952, s 37A - Criminal Procedure Code, s 113

Evidence - Information given by accused to police leading to discovery of facts - Accused then in custody - Whether admissible - Evidence Act 1950, ss 3, 27 & 167

Words and Phrases - 'Fact' - 'Information' - Evidence Act 1950, ss 3 & 27

In this case the appellant was arrested on 1 September 1983 and at the time of his arrest five packets containing 15.5g of dangerous drugs were found in his trouser pocket. After his arrest he was interrogated by the chief inspector who had arrested him and he gave information which led to the discovery of 155.30g of heroin and other articles at a house. The appellant was charged for the offence of trafficking in the dangerous drug, to wit 155.30g of heroin. He was found guilty and convicted and sentenced to death. On his appeal it was argued that the information leading to the discovery was wrongly admitted in evidence. It was submitted that s 37A of the Dangerous Drugs Act 1952 overrides s 27 of the Evidence Act 1950 and that as no caution had been given to the appellant, the information given by him was inadmissible.

Held, dismissing the appeal:

(1) The amended s 113 of the Criminal Procedure Code does not make any reference to s 27 of the Evidence Act 1950 and for that reason s 27 is neither abrogated nor repealed by implication. The amended s 113 of the Criminal Procedure Code stands by itself and does not in any way affect s 27 and both sections stand independently of each other and are valid in law.

(2) Section 37A of the Dangerous Drugs Act 1952 which is substantially similar to the amended s 113 of the Criminal Procedure Code does not override s 27 of the Evidence Act 1950.

(3) Section 27 of the Evidence Act is an exception to the prohibition imposed by the preceeding ss 24, 25 and 26 of the Act and it should be strictly construed and applied. It must be borne in mind that for s 27 to apply, the information must be such as has caused discovery of a fact. In other words, the fact must be the consequence and the information the cause of its discovery. Moreover the information must relate distinctly to the fact discovered.

(4) The word 'information' in s 27, unlike a statement, includes knowledge derived by the person informed by the accused as well as the means taken to impart that knowledge.

(5) In this case the learned trial judge did consider and evaluate the evidence led by the prosecution relating to the information leading to the discovery of the drug. The learned judge did not err in law in allowing or admitting inadmissible evidence. The appeal is therefore dismissed.

Cases referred to

1 *PP* v *Rosyatimah bte Neza & Anor* [1989] 1 MLJ 360 (refd)
2 *Krishnan* v *PP* [1987] 1 MLJ 292 (refd)
3 *PP* v *Sandra Margaret Birch* [1977] 1 MLJ 129 (folld)
4 *Chong Soon Koy* v *PP* [1977] 2 MLJ 78 (folld)
5 *Pulukuri Kotayya* v *King Emperor* (1947) 74 IA 65 (folld)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) s 113
Dangerous Drugs Act 1952 ss 37A, 39B
Evidence Act 1950 ss 3, 27, 167

Jagjit Singh for the appellant.
Stanley Isaac (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Gunn Chit Tuan SCJ (delivering the judgment of the court): The appellant was tried for an offence of trafficking in a dangerous drug, to wit, 155.30g of heroin under s 39B(1)(a) of the Dangerous Drugs Act 1952 (Rev 1980). He was found guilty and convicted by the High Court at Kuala Lumpur and sentenced to death. He appealed against the conviction and sentence and in his petition of appeal there were six grounds of appeal. Mr Jagjit Singh, counsel for the appellant, told the court that the following grounds (i) and (iii) should be taken together as the appellant's main grounds of appeal:

(i) The learned judge erred in law in that he had failed to evaluate the evidence led by the prosecution relating to the information leading to the discovery;
(iii) The learned judge erred in law in allowing and admitting inadmissible evidence.

We considered that the above grounds were the only ones worthy of consideration and the following were the relevant facts of this case in so far as this appeal and our decision are concerned.

The appellant was arrested at Jalan Kalang, off Jalan Sungei Besi, Kuala Lumpur on 1 September 1983 at about 3.40pm. At the time of his arrest five packets containing 15.5g of dangerous drugs were found in his trouser pocket. After his arrest the appellant was interrogated by Chief Inspector Mohamed Yusof bin Mohamed (PW1) who was the officer who had arrested him. Three days after the interrogation the appellant said to Chief Inspector Mohamed Yusof, 'Saya ada simpan lagi 'pek hoon' dalam rumah saya sewa punya - Taman Midah - boleh tunjuk sekarang.' The appellant then led Chief Inspector Mohamed Yusof and a police party to a room in house no 76, Jalan Midah Besar, Taman Midah, Kuala Lumpur, which was rented by him from the mother of a private tutor called Lee Oi See (PW3) and there in that room the appellant said, 'Itu 'pek hoon' ada sana, beg

punya dalam.' Then with his right forefinger, although his hands were handcuffed, he pointed at a yellow paper bag (P7) which was recovered. Inside that bag was a plastic packet (P9) which contained, according to the government chemist, 155.30g of heroin. The information which was given to Chief Inspector Mohamed Yusof during the interrogation and at the house in Taman Midah was written by him on a piece of paper which was produced in court and marked exh P2. The police also recovered and seized from the appellant's room a weighing scale (P12) and a restricted passport (P11) belonging to the appellant and later issued a search list (P3) which was acknowledged by him.

Mr Jagjit Singh referred to s 27 of the Evidence Act 1950, and s 37A of the Dangerous Drugs Act 1952 and submitted that the latter overrides the former. He contended that there must be a caution in this case in accordance with the following proviso (b) to s 37A of the Dangerous Drugs Act:

> (b) in the case of a statement made by such person after his arrest, unless the court is satisfied that a caution was administered to him in the following words or words the like effect -
>
> 'It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence':
>
> Provided that a statement made by any person before there is time to caution him shall not be rendered inadmissible in evidence merely by reason of no such caution having been given if it has been given as soon as possible.

Counsel stated that there was no caution given after the two statements made by the appellant which were recorded in exh P2 which, he submitted, was, together with the statements themselves, therefore inadmissible as evidence.

Counsel conceded that the appellant was arrested on 1 September 1983 for another offence but contended that the issue in this appeal was whether statements made by the appellant under s 37A of the Dangerous Drugs Act covered information received from a person accused of any offence in the custody of a police officer under s 27 of the Evidence Act 1950. He referred to the recent judgment of the High Court at Ipoh in *PP* v *Rosyatimah bte Neza & Anor*,[1] in which case Peh Swee Chin J held at p 363, inter alia, that s 37A of the Dangerous Drugs Act is in pari materia with s 113 of the Criminal Procedure Code and made Rosyatimah's answer to ASP Azmi inadmissible if, inter alia, it was made after her arrest and no caution was administered to her before it was made. We would agree that any statements made by a person after his arrest would be inadmissible under proviso (b) to s 37A of the Dangerous Drugs Act if it amounts to a confession and no caution was administered beforehand or it was not given as soon as possible thereafter. We would, however, point out that the learned judge was not concerned in that case with the issue as to whether such statement was admissible under s 27 of the Evidence Act 1950.

Counsel for the appellant also referred to *Krishnan* v *PP*[2] in which case this court held at p 293 that a statement of the accused to the investigation officer containing admissions was wrongly admitted in evidence as the accused had then been arrested and no caution had been administered under s 113(1) of the Criminal Procedure Code, nor was any caution administered soon after the statement had been made under the circumstances envisaged under proviso (b) to that subsection. The court also held in that case that that statement contained evidence not admissible under s 27 of the Evidence Act, as it included more than information which distinctly relates to the facts discovered.

The deputy public prosecutor in his submission stated that the point canvassed before us was not taken up before the learned judge in the High Court. He also stated that there was no authority on the interplay between s 27 of the Evidence Act 1950, and s 37A of the Dangerous Drugs Act 1952. However, he referred to *PP* v *Sandra Margaret Birch*[3] and pointed out that the High Court at Penang had dealt with the interplay of s 27 of the Evidence Act 1950, and s 113 of the Criminal Procedure Code (FMS Cap 6). In that case Arulanandom J (as he then was) held at p 130 that all statements if they fall within the province of s 27 of the Evidence Act are admissible in the courts of law, and such statements are not repugnant to the amended s 113 of the Criminal Procedure Code. The learned judge also pointed out that the old s 113 of the Criminal Procedure Code imposed an absolute prohibition on the use of any statement made by any person to a police officer in the course of police investigation. The amended s 113 of our Criminal Procedure Code does not contain any absolute prohibition of statements made to the police during police investigation. We would agree with the dictum of the learned judge in that case that the amended s 113 of our Criminal Procedure Code stands by itself and does not in any way affect s 27 of the Evidence Act and both sections stand independently of each other and are valid in law. The amended, s 113 of the Criminal Procedure Code does not make any reference to s 27 of the Evidence Act and we would also agree with Arulanandom J (as he then was) that for that reason, s 27 of the Evidence Act is neither abrogated nor repealed by implication.

After a brief reference to the following sub-s (3) of s 37A of the Dangerous Drugs Act 1952, which ties up that Act with the Criminal Procedure Code:

> Where a statement is purported to be made by a person charged with an offence against this Act under and in accordance with section 113 of the Criminal Procedure Code, the

> statement so made shall be deemed to have been made under and in accordance with this section.

the learned deputy public prosecutor referred to the Federal Court case of *Chong Soon Koy* v *PP*.[4] In that case it was held, inter alia, that a statement relating to the discovery of a firearm and ammunition was rightly admitted in evidence. Suffian LP (as he then was) referred to, at p 79, the operation of s 27 of the Evidence Act which reads as follows:

> When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information, whether such information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

and stated that the fact discovered embraces the place from which the pistol and ammunition were produced and the knowledge of the accused as to that. As for the information supplied by the accused relating distinctly to the fact thereby discovered, he pointed out that the information with regard to the firearm and some ammunition which the appellant had hidden in the Berapit Hills in Bukit Mertajam was admissible as evidence on the authority of the following passage in the judgment of the Privy Council in *Pulukuri Kotayya* v *King Emperor*[5] at p 77:

> ... In their Lordships' view, it is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A' these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.

Finally, the learned deputy public prosecutor also contended that the handsign of the accused pointing to the yellow paper bag (P7) in which the plastic packet containing the heroin (P9) was recovered amounted to information within the meaning of s 27 of the Evidence Act 1950.

Although we considered that s 37A of the Dangerous Drugs Act, which we found is substantially similar to the amended s 113 of the Criminal Procedure Code, does not override s 27 of the Evidence act 1950, we would take this opportunity to repeat and to add a few words to what has been said about the latter section in other cases decided previously including those cited to us. Firstly, as s 27 is an exception to the prohibition imposed by the preceding ss 24, 25 and 26 of the Evidence Act, it should be strictly construed and applied. Secondly, it must be borne in mind that for s 27 of the Evidence Act to apply, the information must be such as has caused discovery of a fact. In other words the fact must be the consequence and the information the cause of its discovery. Moreover the information must relate distinctly to the fact discovered. (*Chong Soon Koy* v *PP*;[4] *Pulukuri Kotayya* v *King Emperor*[5]).

The expression 'fact' is defined in s 3 of the Evidence Act as follows:

> 'fact' means and includes -
> (a) any thing, state of things or relation of things capable of being perceived by the senses;
> (b) any mental condition of which any person is conscious;

As pointed out by Suffian LP (as he then was) in *Chong Soon Koy* v *Public Prosecutor*,[4] their Lordships of the Privy Council in *Pulukuri Kotayya* v *King Emperor*[5] had observed that 'it is fallacious to treat 'fact discovered' within s 7 as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this and the information given must relate distinctly to this fact'.

It must also be observed that the legislature has used the expression 'information' in s 27 of the Evidence Act and therefore did not intend it to have the same meaning as a statement. Although that expression is not defined in the Evidence Act, unlike a statement, it includes knowledge derived by the person informed by the accused as well as the means taken to impart that knowledge.

Having perused the judgment of the learned judge, we were satisfied that he did consider and evaluate the evidence led by the prosecution relating to the information leading to the discovery of the drug. We were also satisfied that the learned judge did not err in law in allowing or admitting inadmissible evidence. After considering the provisions of s 167 of the Evidence Act which is as follows:

> The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it appears to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

we were satisfied that there was sufficient evidence in this case to prove the guilt of the appellant and to justify his conviction. We therefore dismissed the appeal and confirmed the conviction and sentence on the appellant.

Appeal dismissed.

Solicitors: *Jagjit Singh & Co.*

Reported by *Prof Ahmad Ibrahim*